



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2020-05

The Prosecutor v. Salih Mustafa

Before: Trial Panel I

Judge Mappie Veldt-Foglia, Presiding Judge

Judge Roland Dekkers

Judge Gilbert Bitti

Judge Vladimir Mikula, Reserve Judge

Registrar: Fidelma Donlon

Date: 16 July 2021

Language: English

Classification: Public

**Public Redacted Version of Decision on the Specialist Prosecutor's request to
amend its exhibit and witness lists and related matters**

To be notified to:

Specialist Prosecutor

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Counsel for the Accused

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Victims' Counsel

Anni Pues

TRIAL PANEL I (Panel) hereby renders this decision on the Specialist Prosecutor's request to amend its exhibit and witness lists and related matters.

I. PROCEDURAL BACKGROUND

1. On 15 February 2021, the Specialist Prosecutor's Office (SPO) submitted its Pre-Trial Brief, list of witnesses (List of Witnesses), and list of exhibits (List of Exhibits) pursuant to Rule 95(4) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (Rules).¹
2. On 7 May 2021, the Pre-Trial Judge transmitted the case file to the Panel, pursuant to Rule 98 of the Rules.²
3. On 9 June 2021, the Panel held a first trial preparation conference (Trial Preparation Conference).³ On 9 and 10 June 2021, two additional trial preparation conferences took place in closed session.⁴

¹ KSC-BC-2020-05, F00082, Specialist Prosecutor, *Submission of Pre-Trial Brief, with Witness and Exhibit Lists*, 15 February 2021, public, with Annexes 1-3, strictly confidential and *ex parte*. Confidential redacted versions of the SPO List of Witnesses and the SPO List of Exhibits were filed on 17 February 2021, F00085/A02 and F00085/A03. A corrected version of the Pre-Trial Brief was filed on 23 February 2021, in strictly confidential and *ex parte* (F00088/A01) and confidential redacted (F00088/A02) version.

² KSC-BC-2020-05, F00119, Pre-Trial Judge, *Decision Transmitting the Case File to Trial Panel I*, 7 May 2021, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential.

³ KSC-BC-2020-05, Transcript of Hearing (9 June 2021 Public Transcript), 9 June 2021, public.

⁴ Transcript of Hearing, 9 June 2021, strictly confidential and *ex parte*; Transcript of Hearing, 10 June 2021, strictly confidential and *ex parte*.

4. On 18 June 2021, the Panel decided that the trial shall commence on 15 September 2021.⁵ Moreover, pursuant to an SPO's request,⁶ the Panel ordered the latter to file a request for the amendment of its List of Witnesses and its List of Exhibits pursuant to Rule 118(2) of the Rules by Wednesday, 30 June 2021.⁷
5. On 30 June 2021, the SPO filed its request (Request).⁸
6. The Defence for Salih Mustafa (respectively Defence and Accused) did not respond to the Request.

II. SUBMISSIONS

7. The SPO requests⁹ to add to its List of Exhibits the following items: (i) maps of the Prishtinë/Priština area;¹⁰ (ii) photographs of the current location of the former Zllash/Zlaš Detention Compound ([REDACTED]),¹¹ with accompanying official note;¹² (iii) transcripts of two supplementary SPO interviews with witnesses W01679 ([REDACTED])¹³ and W03593 ([REDACTED])¹⁴, and associated exhibits;¹⁵ (iv) transcripts of an SPO interview with witness W04849 ([REDACTED]);¹⁶ and (v)

⁵ KSC-BC-2020-05, F00138, Trial Panel I, *Decision Setting the Date for the Commencement of the Trial and Related Matters* (Decision Setting the Date for the Commencement of the Trial), 18 June 2021, public, paras 17 and 22(f).

⁶ KSC-BC-2020-05, F00130, Specialist Prosecutor, *Prosecution Submissions pursuant to KSC-BC-2020-05/F00123* (SPO Submissions for the Trial Preparation Conference), 2 June 2021, public, paras 5-6; KSC-BC-2020-05, Transcript of Hearing, 9 June 2021, public, pp. 210-212.

⁷ Decision Setting the Date for the Commencement of the Trial, paras 10 and 22(b).

⁸ KSC-BC-2020-05, F00145, Trial Panel I, *Prosecution Request to Amend its Exhibit List and Witness List* (Request), 30 June 2021, confidential, with confidential Annexes 1 and 3 and strictly confidential and *ex parte* Annex 2. A public redacted version of the Request was filed on 1 July 2021, F00145/RED.

⁹ Request, para. 3.

¹⁰ Annex 1 to the Request, item 1.

¹¹ Annex 1 to the Request, item 2.

¹² Annex 2 to the Request, item 1.

¹³ Annex 2 to the Request, item 2.

¹⁴ Annex 2 to the Request, item 4.

¹⁵ For W01679, Annex 2 to the Request, item 3; for W03593, Annex 2 to the Request, item 5.

¹⁶ Annex 1 to the Request, item 3.

[REDACTED],¹⁷ [REDACTED] ([REDACTED]).¹⁸ The SPO further seeks to add witness W04849 to its List of Witnesses.¹⁹

8. The SPO submits that the requested amendments would not cause any prejudice to the Defence insofar as: (i) the material either reflects publicly accessible information or [REDACTED];²⁰ (ii) the supplementary interviews of W01679 and W03593 are brief and only discuss [REDACTED];²¹ and (iii) the Request is made well in advance of the commencement of the trial and the Defence has been put on timely notice of these intended additions.²²

9. In relation to some of the supplemental exhibits, the SPO requests the following protective measures:

- a) authorisation to apply redactions to item 1 of Annex 2 to the Request, i.e. an SPO official note of its visit to Zllash/Zlaš, to protect information currently undisclosed to the Accused and to disclose the unredacted version of this item 30 days before the testimony of the first SPO witness at trial;²³
- b) authorisation to apply redactions to items 2-5 of Annex 2, in order to give effect to protective measures previously granted to W01679 and W03593 in the present case and to accordingly disclose the unredacted versions of these items 30 days before their respective testimony;²⁴ and

¹⁷ Annex 1 to the Request, item 4; Annex 2 to the Request, item 7.

¹⁸ Annex 2 to the Request, items 6 and 8.

¹⁹ Request, para. 4.

²⁰ Request, para. 5(i), (iii)-(iv).

²¹ Request, para. 5(ii).

²² Request, para. 5(v)-(vi).

²³ Request, para. 7.

²⁴ Request, para. 8.

- c) authorisation to temporarily withhold items 6-8 of Annex 2, in order to protect [REDACTED] and to disclose these materials to the Defence 30 days before the testimony of the first witness at trial.²⁵

10. The SPO submits that the requested measures are both necessary, as they are the least restrictive available to provide appropriate protection for the concerned witnesses and to safeguard the measures previously granted or [REDACTED], and proportionate, as the Defence will have access to the full and unredacted documents as soon as the identity of the concerned witnesses is disclosed, and/or a month before the testimony of the first SPO witness.²⁶

III. APPLICABLE LAW

11. Pursuant to Rule 118(2) of the Rules, the Panel may permit, upon timely notice and a showing of good cause, the amendment of the list of witnesses and exhibits filed pursuant to Rule 95(4)(b) of the Rules.

12. Pursuant to Article 21(6) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office (Law), all material and relevant evidence or facts in possession of the SPO which are for or against the accused shall be made available to him or her before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.

13. Pursuant to Article 23(1) of the Law and Rules 80(1) and 108(1)(b) of the Rules, a Panel may order, *proprio motu* or upon request, appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of

²⁵ Request, para. 9.

²⁶ Request, paras 10-11.

witnesses, victims participating in the proceedings, as well as other persons at risk on account of testimony given by witnesses.

14. Pursuant to Rule 108(1)(a) and (c) of the Rules, the SPO may apply to the Panel to withhold information in whole or in part where the disclosure of such information may prejudice ongoing or future investigations or be contrary for any other reason to the public interest or the rights of third parties.

15. Pursuant to Rule 108(3) and (4) of the Rules, when information which is subject to disclosure is withheld from the Defence, appropriate counterbalancing measures may be adopted, *proprio motu* by the Panel or upon request by a Party, to ensure the Accused's right to a fair trial.

IV. ANALYSIS

A. AMENDMENT OF THE LIST OF EXHIBITS AND LIST OF WITNESSES

a) Timing of the Request

16. Rule 118(2) of the Rules provides that the SPO's request for amendment be noticed timely. In this regard, the Panel recalls that the trial will commence on 15 September 2021.²⁷ The Panel further notes that most items originated only recently, as a result of follow-up investigative activities. Against this backdrop, the SPO promptly brought its Request to the attention of the Panel, the Parties and Victims' Counsel, anticipating its intention to amend its List of Exhibits in its submissions for the Trial Preparation Conference²⁸ and informing the Parties of its intention to amend its List of Witnesses at the Trial Preparation Conference itself.²⁹ The Panel finds that the Defence will have sufficient time to assess the material, in compliance with its right to have adequate

²⁷ Decision Setting the Date for the Commencement of the Trial, para. 22(f).

²⁸ SPO Submissions for the Trial Preparation Conference, paras 5-7.

²⁹ 9 June 2021 Public Transcript, p. 211, lines 2-8.

time and facilities for the preparation of the Accused's defence.³⁰ Accordingly, the Panel finds that the Request was submitted in a timely manner.

b) List of Exhibits

17. Regarding items 1 and 2 of Annex 1 to the Request, the Panel finds that these reflect publicly accessible information (topographic maps and photographs of a publicly accessible location) that might be of general assistance to the Parties and the Panel in the assessment of the evidence and in the conduct of the trial proceedings. The Panel finds that no prejudice to the Defence arises from their addition to the SPO's List of Exhibits.³¹ Turning to items 2-5 of Annex 2 to the Request, i.e. the supplementary interviews of W01679 and W03593 (and related exhibits), the Panel notes that they mainly discuss photographs of the Zllash/Zlaš Detention Compound, [REDACTED].³² Moreover, the Panel notes that such interviews were conducted [REDACTED], which was filed after the SPO had filed its List of Exhibits.³³ With regard to item 4 of Annex 1 and items 6-8 of Annex 2, [REDACTED], the Panel notes that the processing of [REDACTED] was only finalised after the submission of the SPO's List of Exhibits.³⁴ Moreover, the Panel recalls that, [REDACTED], [REDACTED]. In this regard, when balancing the SPO's request for amendment of the List of Exhibits with the protection of the Accused's right to a fair trial, the Panel [REDACTED], [REDACTED].³⁵ Having regard to the above, the Panel finds that the SPO has shown good cause for the requested amendment of its List of Exhibits, which does not adversely affect the Accused's ability to duly prepare for trial.

³⁰ See Article 21(4)(c) of the Law.

³¹ As a consequence, the same goes for item 1 of Annex 2, which is the Official note of the SPO visit to Zllash/Zlaš and other locations.

³² [REDACTED].

³³ [REDACTED].

³⁴ See Annex 2 to the Request, items 6 and 8.

³⁵ Request, fn. 11.

c) List of Witnesses

18. Regarding the SPO's request to add witness W04849 to its List of Witnesses, the Panel notes that the latter [REDACTED].³⁶ In balancing the SPO's right to request an amendment to its List of Witnesses with the Accused's right to have adequate time for the preparation of his defence, the Panel gives particular weight to the fact that [REDACTED].³⁷ The Panel further notes that the Defence did not object to this part of the Request, either in writing or during the Trial Preparation Conference, where the SPO anticipated its intention to add a witness to its List of Witnesses.³⁸ The Panel therefore finds that the SPO has shown good cause for W04849's addition to the List of Witnesses and that W04849's addition does not impinge on the Accused's right to a fair trial. Accordingly, the Panel also authorises the SPO to add the transcript of W04849's interview (item 3 of Annex 1 to the Request), to the SPO's List of Exhibits.

B. PROTECTIVE MEASURES

19. As stated in the Framework Decision on Disclosure,³⁹ the legal test for determining if certain information may be withheld from the receiving Party entails an assessment of whether: (i) the disclosure of the information in question to the receiving Party, as opposed to the general public, poses an objectively justifiable risk to the protected person or interest; (ii) the protective measure is strictly necessary. Thus, if less restrictive protective measures are both sufficient and feasible, such protective measures must be chosen; and (iii) the protective measure is proportionate in view of the prejudice caused to the Accused and a fair trial.

³⁶ [REDACTED].

³⁷ Annex 1 to the Request, item 3, [REDACTED], p. 9, lines 8-9; *see also* Request, fn. 10.

³⁸ 9 June 2021 Public Transcript, p. 213, lines 11-18.

³⁹ KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 9 October 2020, public, para. 76.

a) Redactions and delayed disclosure of unredacted material

20. Regarding item 1 of Annex 2 to the Request, the Panel notes that the redactions sought concern [REDACTED], which is currently undisclosed to the Accused. The Panel notes that the Pre-Trial Judge has consistently granted redactions to [REDACTED].⁴⁰ In order not to defeat existing protective measures, the Panel finds it necessary to uphold the same measures in relation to the material included in item 1 of Annex 2 to the Request, as there are no less restrictive measures to eliminate or reduce the risks for the witnesses in the present case. As to the proportionality of such measures, the Panel notes that the Accused will receive the unredacted version of the material 30 days before the testimony of the first witness at trial, who is meant to appear on 20 September 2021.⁴¹ Accordingly, the Panel finds that the requested measure is proportionate and does not unduly interfere with the Accused's right to a fair trial. It therefore authorises the SPO to apply the proposed redaction to item 1 of Annex 2 and to delay disclosure of the unredacted version of the aforementioned item until 30 days before the testimony of the first SPO witness.

21. Regarding items 2-5 in Annex 2 to the Request, the Panel recalls that W01679 and W03593 have been granted the following protective measures in the present case: (i)

⁴⁰ KSC-BC-2020-05, F00041/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of First Decision on Specialist Prosecutor's Request for Protective Measures* (First Decision on Protective Measures), 20 October 2020, strictly confidential and *ex parte*, para. 39(a)-(b); F00053/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Second Decision on Specialist Prosecutor's Request for Protective Measures* (Second Decision on Protective Measures), 24 November 2020, strictly confidential and *ex parte*, paras 51(a)-(e); F00090/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Third Decision on Specialist Prosecutor's Request for Protective Measures* (Third Decision on Protective Measures), 1 March 2021, strictly confidential and *ex parte*, para. 19(a)-(d).

⁴¹ Decision Setting the Date for the Commencement of the Trial, para. 20.

[REDACTED];⁴² (ii) [REDACTED];⁴³ (iii) [REDACTED];⁴⁴ and (iv) [REDACTED].⁴⁵ The Panel is now called upon to determine whether additional materials related to these witnesses may be redacted, in line with the protective measures in place.

22. The Panel incorporates by reference the Pre-Trial Judge's previous findings that there is an objectively justifiable risk to W01679 and W03593 arising from the disclosure of their identities to the Defence.⁴⁶ As to the necessity of the requested measures, the Panel finds that the redactions sought are necessary in order not to defeat existing protective measures and, in turn, to protect the witnesses' identities. In this respect, the Panel considers that there are no less restrictive measures that could overcome or reduce the risk to these witnesses. Lastly, the Panel recalls that the Defence will receive all materials pertaining to these witnesses, in unredacted form, when their identities are disclosed and it will have access to the witnesses' complete evidence and testimonies in the courtroom. The Panel considers that these are appropriate counterbalancing measures in the present circumstances to uphold the Accused's right to a fair trial. Having regard also to the fact that the scope of the aforementioned items is limited, as the interviews mainly aim at [REDACTED], the Panel finds that the requested measures are proportionate. Accordingly, the Panel authorises the SPO to apply the proposed redactions to the materials listed in Annex 2 to the Request related to W01679 (items 2 and 3) and W03593 (items 4 and 5) and to delay disclosure of the unredacted versions of the aforementioned items to the Defence until 30 days before their respective testimony.

⁴² First Decision on Protective Measures, para. 39(b).

⁴³ First Decision on Protective Measures, para. 39(a)-(b); Second Decision on Protective Measures, para. 51(a).

⁴⁴ Second Decision on Protective Measures, para. 51(b); Third Decision on Protective Measures, para. 19(d).

⁴⁵ First Decision on Protective Measures, para. 39(c).

⁴⁶ First Decision on Protective Measures, paras 19, 22.

b) Request to withhold material

23. Regarding items 6-8 in Annex 2 to the Request, the Panel recalls that temporarily withholding entire documents from the Defence, albeit permissible, is an exceptional measure, as it may cause prejudice to the Defence.⁴⁷ However, in the circumstances of the present case, having carefully reviewed the aforementioned items, the Panel notes that they contain [REDACTED], [REDACTED]. Insofar as the Defence will receive the unredacted materials listed in items 6-8 of Annex 2 to the Request 30 days before the testimony of the first SPO witness, who is meant to appear on 20 September 2021,⁴⁸ the Panel finds that the requested measures are proportionate and do not unduly interfere with the Accused's right to a fair trial. The Panel therefore authorises the SPO to withhold from the Defence the materials listed in items 6-8 of Annex 2 to the Request until 30 days before the testimony of the first SPO witness.

C. CLASSIFICATION OF F00130/A02

24. The Panel recalls that it had requested submissions from the SPO in relation to the current classification of filing F00130/A02.⁴⁹ The SPO submits that this document should remain strictly confidential and *ex parte*, as the extent of redactions required would render the document unintelligible.⁵⁰ Accordingly, the SPO proposes to disclose a confidential (minimally) redacted version of F00130/A02 once the identity of the first SPO witness, including the witness's unredacted statements, are disclosed to the Defence.⁵¹

⁴⁷ Second Decision on Protective Measures, paras 16, 44.

⁴⁸ Decision Setting the Date for the Commencement of the Trial, para. 20.

⁴⁹ Decision Setting the Date for the Commencement of the Trial, para. 22(k).

⁵⁰ KSC-BC-2020-05, F00139, Specialist Prosecutor, *Confidential Redacted Versions of Prosecution's submissions on the reclassification of F00130/A02* (SPO Submissions on F00130/A02), 25 June 2021, confidential, paras 2-6.

⁵¹ SPO Submissions on F00130/A02, para. 7.

25. The Panel finds the SPO justification reasonable and, accordingly, orders the SPO to file a confidential redacted version of F00130/A02 once the identity of the first SPO witness, including the witness's unredacted statements, are disclosed to the Defence.

V. DISPOSITION

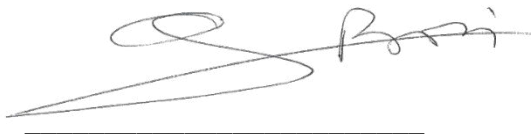
26. For the above-mentioned reasons, the Panel hereby:

- a. **AUTHORISES** the SPO to add the items listed in Annexes 1 and 2 to the Request to its List of Exhibits;
- b. **AUTHORISES** the SPO to add W04849 to its List of Witnesses;
- c. **AUTHORISES** the SPO to disclose to the Defence the materials listed in Annex 2, items 1-5, in redacted form, with the proposed redactions;
- d. **AUTHORISES** the SPO to delay disclosure of the unredacted version of item 1 in Annex 2 to the Request until 30 days before the testimony of the first SPO witness;
- e. **AUTHORISES** the SPO to delay disclosure of the unredacted versions of items 2-3 in Annex 2 to the Request (related to W01679) and items 4-5 in the same Annex (related to W03593) to the Defence until 30 days before their respective testimony;
- f. **AUTHORISES** the SPO to withhold from the Defence the materials listed in items 6-8 of Annex 2 to the Request until 30 days before the testimony of the first SPO witness;
- g. **ORDERS** the SPO to disclose the above material, with redactions as authorised, as well as to file its amended List of Exhibits and List of Witnesses by **Friday, 30 July 2021**; and

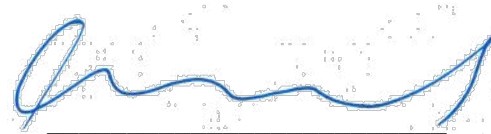
- h. **ORDERS** the SPO to file a confidential redacted version of F00130/A02 once the identity of the first SPO witness, including the witness's unredacted statements, are disclosed to the Defence.



Judge Mappie Veldt-Foglia
Presiding Judge



Judge Gilbert Bitti



Judge Roland Dekkers

Dated this Friday, 16 July 2021
At The Hague, the Netherlands.